

Staff  
Summary  
Report



To: Mayor & City Council  
Through: City Manager

Agenda Item Number: 34  
Meeting Date: 3-22-01

**SUBJECT:** LEASE AGREEMENT FOR TRANSIT STORE

**PREPARED BY:** CARLOS DE LEON, ASSISTANT TRANSIT MANAGER (350-8527)

**REVIEWED BY:** MARY O'CONNOR, TRANSIT MANAGER (350-8819)  
GLENN KEPHART, DEPUTY PUBLIC WORKS MANAGER (350-8205)

**BRIEF:** Request approval for a lease agreement with Fifth College, LLC for transit store space.

**COMMENTS:** **PUBLIC TRANSIT (1106)** Request approval of lease agreement with Fifth College, LLC for \$22,500 per year to provide space for a transit store.

**Document Name:** (20010322pwcdl03) **Supporting Documents:** Yes

**SUMMARY:** At the June 15, 2000, Issue Review Session, the Mayor and Council authorized a letter of intent to lease transit store space in the "Studios 5C" redevelopment project, 502 S. College Avenue, at the southwest corner of College Avenue and Fifth Street. The transit store will provide an interim facility for transit ticket sales, information, and secured public restrooms along College Avenue until a downtown Transit Center is completed. The following summarizes the lease agreement for this space:

- The transit store would be located on the first floor facing College Avenue (Suite 101) and occupy 890 square feet.
- Rent is \$25 per square foot per year or approximately \$22,260. Rent includes taxes and common area maintenance. Trash disposal will be shared and will not exceed \$20 per month or \$240 per year. The City will provide janitorial service for the transit store and pay for utilities.
- The landlord will provide basic tenant improvements including air conditioning and heating system, restrooms, and telephone panels.
- No parking spaces for the lease will be provided. A 20-minute on-street loading zone will added nearby.
- The term of the agreement is for three years with two optional one-year terms. The estimated commencement date of this lease is April 2001, dependent upon the completion of the building.

**FISCAL NOTE:** Funding for transit store lease space, personnel, and other expenses was requested in the supplemental budget process. These items are requested in the applicable account codes within the transit program cost center 3911.

**RECOMMENDATION:** That the Mayor and City Council approve a lease agreement with Fifth College, LLC for transit store space at 502 S. College Avenue.

Approved by:

Howard C. Hargis  
Public Works Manager

**LEASE**

**BETWEEN**

**FIFTH COLLEGE, LLC, Landlord**

**and**

**CITY OF TEMPE, Tenant**

Dated this \_\_\_\_ day of \_\_\_\_\_, 2001

## BASIC LEASE INFORMATION

LEASE DATE: \_\_\_\_\_, 2001

LANDLORD: FIFTH COLLEGE, L.L.C.  
c/o Gammage & Burnham  
Two North Central Avenue, 18<sup>th</sup> Floor  
Phoenix, Arizona 85004  
Attention: Grady Gammage, Jr.

TENANT: CITY OF TEMPE  
Transit Office  
20 East 6<sup>th</sup> Street  
Tempe, Arizona 85280  
Attention: Carlos DeLeon

PREMISES: Those Premises shown on that floor plan attached hereto as *Exhibit "A-2"*, also known as Retail Space 1, 502 South College Avenue, Tempe, Arizona, comprising 890 square feet.

BUILDING: That building located at 502 South College Avenue, Tempe, Arizona, together with all parking areas, sidewalks, driveways, landscaping and other common areas designated by Landlord from time to time.

TERM: Three (3) years from Commencement Date.

Estimated Commencement Date: April 17, 2001

MONTHLY BASE  
RENTAL PAYMENT: \$1,855.00 (Per square foot rental \$25.00 per square foot per year on total rentable area of 890 square feet).

EXPENSES: Landlord to pay real property taxes, included in rent, no increase during lease term;

No additional charge to tenant for common area maintenance;

Tenant to provide own janitorial service on leased space;

Tenant to pay utility costs based on separate allocation or formula related to first floor utilities;

Tenant to pay share of trash disposal costs, not to exceed  
\$20/month

PERMITTED USE: Public Transit Store

The foregoing Basic Lease Information is part of the Lease. Each reference in the Lease to any of the Basic Lease Information shall mean the respective information set forth above. Tenant acknowledges that it has read and understands all of the provisions contained in the entire Lease and all Exhibits which are a part hereof and agrees that the Lease, including the Basic Lease Information and all Exhibits, reflects the entire understanding and reasonable expectations of Tenant regarding the Premises.

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## LEASE

### 1. PREMISES.

On the terms and conditions contained herein, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord those premises described in the Basic Lease Information and designated on the floor plan attached hereto as *Exhibit "A"* (the "Premises").

### 2. TERM.

**2.1 Term.** Except as provided herein, the term of this Lease shall be for the period set forth in the Basic Lease Information.

**2.2 Term Commencement Date.** The term hereof and all obligations, covenants and conditions of this Lease shall commence on the "Commencement Date." The Commencement Date shall be that date that Landlord substantially completes the improvements for which Landlord is responsible pursuant to *Section 6* of this Lease and tenders possession of the Premises to Tenant. In the event that the Commencement Date has not occurred as of that date which is one (1) year after the date of this Lease, then in that event, this Lease shall automatically terminate and be of no further force or effect.

**2.3 Holding Over.** If Tenant remains in possession of the Premises after the expiration or termination of this Lease, with Landlord's written consent, and no other lease is executed, Tenant shall be deemed a tenant on a month-to-month basis on the terms and conditions herein, but at the monthly rental in effect prior to the date of such expiration or termination. Either Landlord or Tenant may terminate such month-to-month tenancy upon thirty (30) days prior written notice. If Tenant remains in possession of the Premises after the expiration or termination of this Lease without Landlord's written consent and without a new lease in effect, Landlord shall be entitled to collect from Tenant for each day of such possession (as Base Rental hereunder and not as liquidated damages) an amount equal to one and one-half times the daily Base Rental for the last month prior to the date of such expiration or termination, together with all other sums owing hereunder, and Tenant shall indemnify and hold Landlord harmless from any loss, damages, liability, obligations, expenses, and fees (including attorneys fees) resulting from such holding over. Landlord's right to collect such rental shall be in addition to and shall not preclude concurrent, alternative or successive exercise of any other rights or remedies available to Landlord.

**2.4 Options to Extend.** So long as Tenant is not then in default under this Lease, Tenant shall have the right to extend the term of this Lease for up to two (2), consecutive one (1) year periods upon three (3) months prior written notice from Tenant to Landlord (each such extension term, hereinafter referred to as an "Option Term"). All terms and conditions applicable to Tenant's lease of the Premises for any option term shall be the same terms and

conditions as set forth herein except for Base Rental which shall be determined as described in *Section 3.4* below.

### 3. RENTAL.

**3.1 Base Rental.** For each year of the term hereof, Tenant shall pay to Landlord as rental hereunder that sum identified as the yearly Base Rental in the Basic Lease Information. Except for the first year of the term hereof, Base Rental shall be paid in twelve (12) equal monthly installments in advance on the first day of each calendar month of the term hereof. If the term of this Lease commences or terminates on other than the first day of a calendar month, then the Base Rental for said partial month shall be prorated on a per diem basis (based on a 30-day month), and shall be paid in full on the first day of such partial month on which the term of this Lease is in effect.

**3.2 Payment.** Base Rental and all other sums payable pursuant hereto shall be paid, without deduction, offset, prior notice or demand, to Landlord at the address set forth in the Basic Lease Information, or at such other place or to such other person as Landlord may from time to time designate by notice hereunder. All payments shall be made in lawful money of the United States of America.

**3.3 Rental Taxes.** Together, with and in addition to any payment of rental or any other sums payable to or for the benefit of Landlord pursuant to this Lease, Tenant shall pay to Landlord any excise, sales, occupancy, privilege, rental or transaction privilege tax (except Landlord's income tax) levied by any governmental authority upon Landlord as a result and to the extent of such payments hereunder, or as a result of Tenant's use or occupancy of the Premises.

**3.4 Base Rental During Option Terms.** The Base Rental payable by Tenant for each Option Term, if exercised by Tenant, shall be equal to the then current market rental rates for office space similar in location, quality, character and style to that of the Premises in the greater Phoenix metropolitan area. Landlord and Tenant shall work together in good faith to mutually determine the current market rental rate within ninety days (90) after Landlord's receipt of Tenant's notice of its election to extend the term of this Lease. If the Landlord and Tenant are unable to mutually agree upon the current market rental rate by such date, then in that event, they shall each select an Arizona-licensed commercial real estate broker, having at least ten (10) years experience in the commercial office rental market in the greater Phoenix metropolitan area, who shall then select a third real estate broker with similar qualifications. Within thirty (30) days after their selection, the three real estate brokers shall each prepare an independent opinion of the current market rental rate applicable to the Premises as contemplated hereby and the average of the three opinions shall determine the current market rental rate for the applicable Option Term. All costs, fees and charges of such real estate brokers shall be paid one half by Landlord and one half by Tenant.

#### **4. OPERATING COSTS.**

**4.1 Real Property Taxes.** Landlord is responsible for paying all real property taxes on the premises. No additional charges shall be made to tenant for such taxes, and rent may not be increased during lease term for any real property tax increases.

**4.2 Common Area Maintenance.** Landlord is responsible for keeping common areas of building in good maintenance and repair. No additional charges may be imposed on Tenant for common area maintenance.

**4.3 Janitorial Service within Leased Premises.** Tenant shall bear full responsibility for all cleaning, janitorial service and routine upkeep within leased premises.

**4.4 Utility Costs.** Tenant shall be responsible for all utility costs related to the premises. Landlord and Tenant intend that this be based upon actual measured utility costs attributable to premises by metering electricity; chilled water usage or other objective measure. Landlord intends to install an energy management system to make such measurement possible. To the extent such measurement is not possible, Landlord and Tenant will agree upon a formula based on first floor utility costs.

**4.5 Trash Disposal.** The building has an agreement with Arizona State University (ASU) to share the trash dumpster located southeast of the building. The building has agreed to pay 25% of the total cost of that dumpster. Tenant shall make use of this dumpster for trash disposal. Additional charge to Tenant shall be \$20 per month. In the event Tenant or Tenant's subleasees generate an unexpectedly large amount of trash, Tenant and Landlord shall use best efforts to negotiate a change in this amount.

#### **5. USE OF PREMISES.**

**5.1 Permitted Uses.** Tenant shall not use or permit the use of the Premises for any purpose except the purpose set forth in the Basic Lease Information without the prior written consent of Landlord.

**5.2 Compliance with Insurance Requirements.** Tenant shall not engage in or permit any activity which will cause the cancellation or increase the existing premium rate of fire, liability, or other insurance maintained with respect to the Premises or the Building. Tenant shall not sell or permit to remain in or about the Premises any article that may be prohibited by the standard form "All Risk" fire and extended coverage insurance policies to be maintained pursuant to this Lease. Tenant shall comply with all requirements pertaining to the use of the Premises necessary for maintenance of such fire and public liability insurance as Landlord may from time to time obtain for the Premises or the Building.

**5.3 Waste, Nuisance, Etc.** Tenant shall not commit or permit any waste on the Premises or in any manner deface or injure the Premises or the Building. Tenant shall not use the Premises for offensive or immoral purposes (in the sole judgment of Landlord), or commit or permit on the Premises any offensive, noisy or dangerous activity or other nuisance or other activity or thing which may disturb the quiet enjoyment or peaceable possession of any other tenant in the Building. Tenant shall not overload the floor of the Premises beyond the load limit therefor established by Landlord. Tenant shall not employ any sound emitting device in or about the Premises that is audible outside the Premises, except fire and burglar alarms.

**5.4 Area Above Standard Finish Ceiling Line.** Tenant shall have no right to use, enter into or cause entered that portion of the Premises above the standard ceiling line (as established by Landlord) without the prior written consent of Landlord.

**5.5 First Floor Common Areas; No Parking Rights.** Subject to the rules and regulations attached to this Lease, and the rights reserved by Landlord in *Article 25* below, Tenant shall be entitled to the nonexclusive use in common with Landlord, other lessees and occupants of the Building, and other parties authorized by Landlord, their respective employees, agents, contractors and customers, of all common areas and facilities on the first floor of the Building as Landlord shall from time to time designate for the common use of the first floor tenants in the Building, which expressly includes the restroom facilities on the first floor of the Building. Notwithstanding the foregoing, the Tenant shall not have the right to utilize any parking spaces within the parking facilities which are a part of or appurtenant to the Building.

**5.6 Compliance with Laws.** Tenant shall comply, at its expense, with all laws, ordinances, rules and regulations of any public authority at any time now or hereafter applicable to the Premises or any activity therein or use thereof, and shall, at its expense, construct and install any improvements which may be required from time to time by applicable laws, ordinances, rules and regulations as a result of Tenant's use or occupancy of the Premises.

**5.7 Sidewalks, Signs, Exterior, Etc.** Landlord will install, at its cost, one sign identifying Tenant. Such sign shall be mounted on the south edge of the canopy and shall read "Bus Info; Transit Info" or an equivalent phrase. Sign shall not be illuminated. Tenant shall not display or exhibit any products, goods, wares, or merchandise and shall not distribute advertising materials outside of the Premises, without prior written approval of Landlord. Tenant shall not erect or place on or about the exterior of the Premises or on any windows, glass partitions or doors thereof, including without limitation, the canopy installed above the window line on the exterior of the Premises, any signs or other written information unless approved in writing by Landlord. Tenant shall not install exterior lighting on or decorate, paint or otherwise alter or improve the exterior of the Building or Premises, and Tenant shall not install any antenna or other structure or object on the roof or any other portion of the Building, unless the type, nature, location and size of such structure, object or

antenna is approved in writing by Landlord. Tenant shall not store products, containers or merchandise on the Building in areas outside of the Premises except for the temporary loading and unloading of vehicles.

## **6. CONDITION OF PREMISES; TENANT IMPROVEMENTS.**

**6.1 Interior Improvements.** Landlord hereby agrees that it shall deliver the Premises to Tenant substantially completed with the following improvements: Building shell improvements, all as shown on attached Exhibit A-1 and A-2.

**6.2 Exterior Improvements.** Landlord shall install at its expense, a building canopy adjacent to Tenant's space, approximately 10' in height, as shown on Exhibit A-2. Canopy shall be solid and provide shade and rain coverage. Beneath canopy, Landlord will install two (2) 3 person bench seats, of a type and design acceptable to both Landlord and Tenant. Benches shall be installed in a configuration acceptable to Tenant. Landlord shall maintain benches.

**6.3 Ticket Window.** Tenant may install, at its expense, a ticket window which opens from the inside space to the outside. The location and design of such window must be approved by Landlord. At the end of the Lease (including any exercised options) Landlord may require Tenant to remove ticket window and install normal storefront consistent with the balance of the space.

## **7. MAINTENANCE AND REPAIR.**

**7.1 Landlord's Obligations.** Unless such maintenance or repairs are required because of any negligent or intentional act or omission of Tenant, its agents, employees, contractors, customers or invitees, Landlord shall clean, maintain and repair, subject to reasonable wear and tear, the common areas of the Building as described in **Section 5.5**; the roof, structural elements, plumbing and electrical wiring and heating, ventilating and air conditioning facilities; and the exterior of the Building. In no event shall Tenant be entitled to undertake any such maintenance or repairs, whether at the expense of Tenant or Landlord, and Tenant hereby waives the benefits of any law now or hereafter in effect which would otherwise provide Tenant with such right.

**7.2 Tenant's Obligations.** Tenant shall, at its expense, maintain the interior of the Premises in a safe and clean condition and in good order and repair, reasonable wear and tear excluded, including, without limitation, the interior of the Premises, all partitions and other interior improvements; all walls, all floor coverings, all telephone and other communication systems, Tenant's signs located in or on the Premises, all of Tenant's equipment, fixtures and other items of personal property. Tenant shall also perform promptly, subject to **Section 5.4**, at its expense, all maintenance or repairs with respect to the Premises and the Building required because of any negligent or intentional acts or omissions of Tenant, its agents, employees, contractors, customers or invitees. Tenant shall perform

such obligations regardless of whether or not: (i) such portions of the Premises requiring repair are reasonably or readily accessible, (ii) the means of making the required repairs are convenient or reasonable, or (iii) the need for such repairs occurs as a result of Tenant's use, the elements or the age of such portions of the Premises. Tenant's obligations under this paragraph shall be performed only by persons or contractors approved by Landlord.

## **8. ALTERATIONS TO PREMISES.**

**8.1 Landlord's Prior Written Consent Required.** Tenant shall not make any alteration, addition or improvement to the Premises or to any fixture, wiring, plumbing, lighting, heating, air conditioning or other equipment therein without the prior written consent of Landlord. Landlord shall be entitled to impose any condition to such consent as it may deem necessary or desirable (including, without limitation, the posting of bonds or use of a contractor designated or approved by Landlord). Any alteration, addition or improvement to which Landlord consents or which is required by law shall be completed in a good and workmanlike manner in accordance with plans, specifications and drawings approved in writing by Landlord, and in compliance with all applicable laws, regulations and codes. Tenant shall timely pay all costs and fees incurred by Tenant in connection with all alterations, additions and improvements permitted or required hereunder.

**8.2 Alterations Become Part of Premises.** Unless Landlord requires the removal thereof upon the termination of this Lease, all such alterations, additions or improvements to the Premises by Tenant (including, without limitation, demolition of earlier improvements, construction or remodeling of interior walls, doors, ceilings, built-in cabinetwork and shelving, lunchroom facilities, and installation, remodeling or replacement of lighting, heating and air conditioning equipment, electrical and telephone circuits, draperies, carpets and other floor coverings, wall coverings, and interior glasswork), except Tenant's Property, as defined in *Section 20.1*, shall become part of the Premises and the property of Landlord immediately upon installation thereof. Any alteration, addition or improvement which Tenant is required or permitted to remove hereunder shall be removed at Tenant's expense immediately upon the termination of this Lease, and Tenant shall promptly repair any damage to the Premises caused by installation or removal of such alteration, addition or improvement.

## **9. LIENS.**

Tenant shall keep the Premises and the Building free and clear of any liens arising out of any work performed, materials furnished or obligations incurred by or on behalf of Tenant, or any work performed, materials furnished or obligations incurred by or on behalf of Landlord if the same arise as a result of Landlord performing an obligation of Tenant hereunder and Tenant fails to reimburse Landlord immediately for the cost thereof. If any such lien is filed against the Premises or the Building, Tenant shall, within ten (10) days thereafter, cause the lien to be fully discharged by either paying the obligation secured thereby or obtaining and recording a payment bond in accordance with the provisions of

Section 33-1004, Arizona Revised Statutes. Tenant is not authorized to act for or on behalf of Landlord as its agent, or otherwise, for the purpose of constructing any improvements to the Premises, and neither Landlord nor Landlord's interest in the Premises shall be subject to any obligations incurred by Tenant. Landlord shall be entitled to post on the Premises during the course of any construction by Tenant such notices of non-responsibility as Landlord deems appropriate for the protection of Landlord and its interest in the Premises. Tenant shall, at least ten (10) days prior to the commencement of any work which might result in any such lien, give to Landlord written notice of its intention to do so. If Tenant fails to fully discharge any such lien within said 10-day period, Landlord may (but shall not be so obligated) pay the claim secured by such lien and any costs, and the amount so paid, together with reasonable attorneys' fees incurred in connection therewith, shall be immediately due and owing from Tenant to Landlord, and Tenant shall pay the same to Landlord with interest at the rate provided in *Section 27.6* from the dates of Landlord's payments. Should any claims of lien be filed against the Premises or any action affecting the title to such property be commenced, the party receiving notice of such lien or action shall forthwith give the other party written notice thereof.

**10. LANDLORD'S ENTRY.**

In addition to any other right of entry provided for in this Lease, Landlord, its employees, agents and contractors, shall be entitled to enter the Premises at any time for the purposes of conducting any inspections thereof, posting non-responsibility notices, making repairs, additions, or alterations thereto or to the Building, showing the Premises to any prospective purchaser, lessee, mortgagee or insurer, and taking necessary action in the event of an emergency. In connection with such entry, Landlord shall be entitled to erect such scaffolding and other necessary structures or equipment as reasonably required by the character of the work to be performed provided that Landlord shall not unreasonably interfere with the conduct of Tenant's business. No entry by Landlord hereunder shall entitle Tenant to terminate this Lease or to a reduction or abatement of rental or other amounts owed by Tenant hereunder nor to any claims for damages. Landlord shall have the right to retain at all times keys to all doors within and into the Premises. No lock shall be changed without the prior written consent of Landlord. Landlord shall be entitled to use in good faith any means to gain entry to the Premises in the event of an emergency or perceived emergency and shall not be liable for any damages resulting therefrom.

**11. TENANT'S INDEMNITY; WAIVER.**

Tenant shall indemnify, defend and hold harmless Landlord from and against any and all claims arising from Tenant's use of the Premises, or from the conduct of Tenant's business thereon or from any activity, work or things done, permitted or suffered by Tenant in or about the Premises, and shall further indemnify, defend and hold harmless Landlord from and against any and all claims arising from any breach or default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease, or arising from any negligence or willful misconduct of the Tenant, or any of Tenant's agents, contractors,

employees, customers or invitees, and from and against all costs, attorneys' fees, expenses and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, shall defend the same at Tenant's expense through counsel satisfactory to Landlord. Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage to property or injury to person on or about the Premises from any cause, and Tenant hereby waives all claims in respect thereof against Landlord, except to the extent such damage or injury is the result of Landlord's gross negligence or intentional misconduct.

## **12. INSURANCE.**

**12.1 Required Insurance.** Tenant, at its sole cost and expense, shall procure and maintain during the term hereof:

(a) A comprehensive general liability insurance policy against claims for bodily injury, death or property damage, occurring in, on or about the Premises, the adjoining sidewalks and passageways, or resulting from Tenant's use, occupancy or maintenance thereof, which policy shall name Landlord, and any other persons or entities designated by Landlord as additional named insureds. Such insurance shall be primary with respect to Landlord and shall be in the amount of at least \$1,000,000.00 combined single limit (or in such higher amounts as Landlord may designate from time to time). Any comprehensive general liability insurance carried by Landlord shall apply in excess of the primary coverage required herein and to be carried by the Tenant. The comprehensive general liability insurance policy maintained by Tenant shall be endorsed to indicate that such policy will cover Tenant's obligations under *Article 12* to the coverage limit to such policy and shall provide that the insurance carrier shall have the duty to defend and/or settle any legal proceeding filed against Landlord seeking damages on account of bodily injury or property damage liability even if any of the allegations of such legal proceedings are groundless, false or fraudulent.

(b) Insurance against damage and destruction to Tenant's personal property and all fixtures, equipment, improvements, additions and other alterations to the Premises which Tenant is entitled or obligated to remove pursuant to this Lease occurring as a result of acts or events typically covered by broad form "All Risk" property damage insurance policies in the amount of full replacement cost. In the event such items are damaged or destroyed, Tenant hereby agrees to diligently and fully repair and restore said items.

(c) Such other insurance in such amounts as may from time to time be reasonably required by Landlord against other insurable hazards which at the time are customarily insured against in the case of premises similarly situated in the metropolitan Phoenix area.



**12.2 Notice of Insurance.** All insurance provided for in this Article shall be effected under valid and enforceable policies issued by insurance companies authorized to do business in the State of Arizona and approved by Landlord. The policies of insurance shall be endorsed to indicate that Tenant's coverage shall not be invalid due to any act or omission on the part of Landlord. The insurance companies issuing such insurance shall agree to notify Landlord in writing of any cancellation, alteration or nonrenewal of said insurance at least thirty (30) days prior thereto. Tenant shall deliver to Landlord, within thirty (30) days after execution of this Lease, certificates evidencing the insurance coverage required herein and confirming that the premiums therefor have been paid in full. Said certificates shall also include a footnote referring to this Lease and certifying that the policy or policies issued to Tenant comply with all of the provisions of this *Article 13*. If Tenant fails to obtain the insurance required herein and deliver said certificates thereof to Landlord as provided for above, Landlord shall be entitled, but without obligation, to obtain said policies at Tenant's expense.

**12.3 Waiver.** Notwithstanding any other provisions in this Lease, Tenant and Landlord hereby waive any and all rights of recovery against the other, or against the officers, employees, agents and representatives of the other, for loss of, or damage to, the waiving party or its property or the property of others under its control to the extent that such loss or damage is insured against under any insurance policy in force at the time of such loss or damage. Tenant shall, upon obtaining the insurance policies required hereunder, give notice to the insurance carrier or carriers of the waiver of subrogation set forth in this Lease and shall obtain, at Tenant's expense, an appropriate waiver of subrogation endorsement from the insurer. If the Premises, the Building or Tenant's Property are damaged or destroyed by fire or any other cause against which Tenant is required to maintain insurance pursuant to this Lease, Landlord shall not be liable to Tenant for any such damage or destruction.

### **13. DAMAGE OR DESTRUCTION.**

**13.1 Termination.** If the Premises or any portion thereof are damaged or destroyed by any cause, Landlord shall reasonably determine, within fifteen (15) days after such casualty, whether it would take more than one hundred eighty (180) days from the date of such damage or destruction to repair the same. If Landlord determines that more than 180 days would be required to repair such damage or destruction, then either Landlord or Tenant shall be entitled to terminate this Lease by written notice to the other. The foregoing notwithstanding, if the Premises or the Building are damaged or destroyed and Landlord, upon inspection, reasonably determines that (i) the cost of repairing the Premises will exceed ten percent (10%) of the replacement cost of the Premises and such damage is not covered by insurance maintained by or payable to Landlord, (ii) the cost of repairing the Premises will exceed twenty-five (25%) of the replacement cost of the Premises and such damage occurs within the last twelve (12) months of the term of this Lease (exclusive of any option periods), or (iii) the Building is damaged to an extent greater than twenty-five percent (25%) of its replacement value (whether or not the Premises are damaged or destroyed), then Landlord

shall be entitled to terminate this Lease by written notice to Tenant given on or before sixty (60) days after the occurrence of such casualty.

**13.2 Repair.** If this Lease is not terminated as provided above, the damage to the Premises shall be repaired as follows:

(a) Tenant shall promptly repair, at its expense, any damage to Tenant's Property and any improvements, additions and other alterations installed or constructed by Tenant.

(b) Landlord shall have the option of repairing any damage caused by any act or neglect of Tenant or its employees, agents or invitees and shall charge to Tenant all costs and expenses incurred in connection therewith (including a service fee for Landlord in an amount equal to 15% of all sums expended by Landlord in performing or supervising the completion of the repairs). Tenant shall pay the same within five (5) days after presentment of a statement to Tenant indicating the amount thereof. In the event Landlord elects not to repair the damage, Tenant shall promptly repair the damage at its expense.

(c) Landlord shall repair, at its expense, all damage not specified in subsections (a) and (b) above.

**13.3 Abatement of Rent.** During the period commencing with the date of any damage or destruction that Landlord is required or elects hereunder to repair, reconstruct or restore, and ending with the completion of such repairs, reconstruction or restoration, rental shall be proportionately abated in an amount equal to the proportion by which the number of rentable square feet in the Premises rendered unrentable bears to the total rentable square feet in the Premises immediately prior to such damage and destruction. Notwithstanding the foregoing, rental shall not abate if such damage or destruction was caused by the negligent or intentional act or omission of Tenant, its agents, employees, customers, contractors, invitees or licensees. Except as expressly set forth herein, Tenant shall not be entitled to terminate this Lease or to a reduction or abatement of rental or other sums payable hereunder in the event of any damage or destruction from any cause whatsoever.

**13.4 Date of Termination.** The effective date of termination for the purposes hereof shall be ten (10) days after receipt by the non-terminating party of the notice of termination from the other party.

## **14. CONDEMNATION.**

**14.1 Termination.** If the Premises or any portion thereof are taken under power of eminent domain or conveyed by Landlord under the threat thereof (a "Condemnation"), this Lease shall automatically terminate as to the part so taken as of the

date of Condemnation. If a portion of the floor area of the Premises, or all or a substantial portion of the parking area of the Building, is taken by Condemnation, and Landlord determines that it would not be economically feasible to utilize the Premises for the purposes for which the same were being used at the time of said taking, then Landlord shall be entitled to terminate this Lease as of the date of condemnation by giving written notice thereof to Tenant on or before twenty (20) days after said date. If more than twenty-five percent (25%) of the floor area of the Building and/or more than twenty-five percent (25%) of the land area surrounding the Building is taken by Condemnation (regardless of whether or not any portion of the Premises are taken), then Landlord shall be entitled to terminate this Lease as of the date of Condemnation by written notice to Tenant on or before twenty (20) days after said date.

**14.2 Abatement of Rent.** In the event of Condemnation of only a portion of the Premises, rental shall be reduced in proportion to the amount of space actually taken.

**14.3 Award.** Landlord shall be entitled to the entire Condemnation award for any partial or entire taking of the Premises or other portion of the Building, including any award for the leasehold estate created hereby, and Tenant hereby waives any claim thereto; provided, however, Tenant shall be entitled to recover from the taking authority (and not from Landlord) such compensation as may be separately awarded to Tenant, in Tenant's own name, for any damages to Tenant's business and any costs or losses incurred by Tenant in removing Tenant's Property.

**14.4 Restoration.** If only a part of the Premises is condemned and this Lease is not terminated pursuant hereto, then Landlord shall in the exercise of reasonable diligence and its own cost restore the Premises to its previous condition as nearly as is reasonable under the circumstances and within a reasonable time period after the Condemnation. In no event, however, shall Landlord be obligated to commence such restoration until it has received the entire Condemnation award for the Premises and in no event shall Landlord be obligated to incur expenses in making such restoration in an amount greater than such award, less costs, expenses, and fees (including attorneys' fees) incurred by Landlord in collecting such award.

## **15. QUIET ENJOYMENT.**

If Tenant pays the rental and other sums payable hereunder and performs all of the other provisions hereof, Landlord shall take no action to disturb Tenant's peaceable and quiet possession of the Premises during the term hereof. This covenant is a covenant as to title and shall not extend to, and Landlord shall not be liable for, any disturbance, act, condition or damage caused by any other tenant in the Building or anyone not otherwise claiming by or through Landlord, nor to any disturbance, act or condition permitted to be taken by or on behalf of Landlord under this Lease.

**16. ESTOPPEL CERTIFICATE.**

Upon receipt of a written request therefor from Landlord, Tenant shall, from time to time, and within ten (10) days after receipt of such request, execute, acknowledge and deliver to Landlord a statement in writing (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the dates to which the rental and other charges are paid in advance, if any, (b) acknowledging that there are no uncured defaults on the part of Landlord, or specifying such defaults if any are claimed, and (c) certifying or acknowledging any other matters that Landlord may reasonably request for certification or acknowledgment. Any such statements may be relied upon by any prospective purchaser or encumbrancer of all or any portion of the Premises or the Building. Tenant's failure to deliver such statement within such time shall be conclusive against Tenant that (i) this Lease is in full force and effect, without modification except as may be represented by Landlord, (ii) there are no uncured defaults in Landlord's performance, and (iii) not more than one month's rent has been paid in advance.

**17. SUBORDINATION.**

This Lease shall be subject and subordinate at all times to the lien of any mortgages, deeds of trust or other security instruments in any amount or amounts whatsoever now or hereafter placed on or against the Building without the necessity of executing and delivering any further instruments on the part of Tenant to effectuate such subordination. Tenant hereby agrees, at the written request of the purchaser of the Landlord's interest pursuant to such foreclosure or other proceedings, to attorn to such purchaser or, at such purchaser's option, to enter into a new lease for the balance of the term hereof upon the same terms and provisions as are contained in this Lease. Notwithstanding the foregoing, Tenant shall execute and deliver such further instrument or instruments evidencing such subordination of this Lease to the lien of any such mortgages, deeds of trust or other security instrument as may be requested by Landlord within ten (10) days after Tenant's receipt of such request. In the event that Tenant shall fail, neglect or refuse to execute and deliver any such instrument(s) within ten (10) days after receipt of written notice to do so and the receipt by Tenant of the instrument(s) to be executed by it, Tenant hereby appoints Landlord, its successors and assigns, the attorney-in-fact of Tenant irrevocably to execute and deliver any and at such instrument (s) for and on behalf of Tenant; provided, however, that Tenant shall not be required to effectuate such subordination, nor shall Landlord be authorized to effect such subordination on behalf of Tenant, unless the mortgagee or beneficiary named in such mortgage, deed of trust or other encumbrance shall first agree in writing, for the benefit of Tenant, that so long as Tenant is not in default under any of the provisions, covenants or conditions of this Lease on the part of Tenant to be kept and performed, that neither this Lease nor any of the rights of Tenant hereunder shall be terminated or modified or be subject to termination or modification, nor shall Tenant's possession of the Premises be disturbed or interfered with, by any trustee's sale or by any action or proceeding to foreclose said mortgage, deed of trust or other encumbrance.

18. **SIGNAGE.**

OMITTED

19. **ASSIGNMENT AND SUBLETTING.**

**19.1 Landlord's Consent Required.** Tenant shall not convey, transfer, sublease, assign, hypothecate, encumber or otherwise dispose of this Lease or any right, title or interest herein, whether voluntarily or by operation of law, without the prior written consent of Landlord, which consent may be given or withheld in Landlord's sole and absolute discretion. Any such assignment or subletting without Landlord's consent shall be void and/or terminate this Lease at the option of Landlord. The consent by Landlord to any assignment or other disposition shall not be construed as a consent to any other assignment or disposition. In the event Landlord approves any assignment or subletting by Tenant, it is hereby agreed by Landlord and Tenant that Tenant shall not realize any financial gain resulting from any increase in the rental value of the Premises. Therefore, as a condition of any assignment or subletting, it is agreed by the parties that Landlord shall receive all consideration due or to become due to Tenant from any assignee or sublessee with respect to such assignment or subletting, including, without limitation, the full and complete rental payments paid by such assignee or sublessee, including any amounts paid in excess of Tenant's financial obligations under this Lease. As a condition to granting its consent hereunder, Landlord shall have the right to require, and Tenant hereby agrees that it shall be reasonable for Landlord to require, that the proposed assignee (i) be financially capable of the payment of the Base Rental and other sums payable by Tenant hereunder and the performance of the other obligations of Tenant set forth herein, (ii) have a good reputation in the business community of which the proposed assignee is a part, and (iii) use the Premises in a manner consistent with the use allowed hereunder and not in violation of any other lease in the Building. Notwithstanding anything contained in the foregoing or elsewhere herein to the contrary, Landlord hereby acknowledges and agrees that Tenant shall have the right to sublease a portion of the Premises to Greyhound Bus Lines or any other bus or private transit service; provided, that no such sublease shall affect in any way Tenant's responsibility to observe and perform all obligations under this Lease.

**19.2 No Release of Tenant.** Regardless of whether Landlord's consent is granted, no subletting or assignment shall release Tenant or Tenant's obligations hereunder or alter the primary liability of Tenant to pay the rent and to perform all other obligations to be performed by Tenant hereunder. The acceptance of rent by Landlord from any other person shall not be deemed to be a waiver by Landlord of any provision hereof. In the event of default by any assignee or successor of Tenant in the performance of any of the terms hereof, Landlord may proceed directly against Tenant without the necessity of exhausting remedies against said assignee or successor.

**19.3 Attorneys' Fees.** In the event Landlord is asked to consent to a sublease or assignment under *Section 19.1* hereof, Tenant shall reimburse Landlord for reasonable attorneys' fees incurred by Landlord in connection with giving such consent.

**19.4 Corporations, Associations and Partnerships.** If the Tenant is a corporation, an unincorporated association or a partnership, the transfer, assignment or hypothecation of any stock or interest in such corporation, association or partnership in the aggregate in excess of fifty percent (50%) shall be deemed an assignment within the meaning and provisions of this *Article 20*. Tenant shall have the right, without Landlord's consent, to assign this Lease or sublet the Premises or any part thereof, to any corporation into which or with which Tenant merges or consolidates and to any parent, subsidiary or affiliated corporation provided that the resulting entity from such merger or consolidation shall have a net worth not less than Tenant's prior to the merger, and provided further that any such assignee shall deliver to Landlord a copy of a document satisfactory to Landlord by which such assignee agrees to assume and perform all of the terms and conditions of this Lease on Tenant's part from and after the effective date of such assignment.

**19.5 No Merger.** The voluntary or other surrender of this Lease by Tenant, a mutual cancellation of this Lease, or the termination of this Lease by Landlord pursuant to any provision contained herein, shall not work a merger, but, at Landlord's option, shall either terminate any or all existing assignments or subleases hereunder, or operate as an assignment to Landlord of any such assignments or subleases.

## **20. REMOVAL OF TENANT'S PROPERTY.**

**20.1 Tenant's Property.** The term "Tenant's Property, " as used in this Lease, is defined as those items of furniture, trade fixtures, equipment and personal property installed in, on or about the Premises by Tenant at Tenant's expense, such as freestanding cabinetwork and casework, metal storage units, signs, office machines, data processing equipment, security devices and chests, kitchen appliances (if permitted by this Lease), and other items of personal property which are not attached or built in.

**20.2 Removal.** Unless Tenant is in default hereunder, Tenant may remove any of Tenant's Property immediately upon the expiration or termination of this Lease, and any of Tenant's Property remaining on the Premises upon such expiration or termination shall, at Landlord's option, become the property of Landlord, or Landlord may dispose of same, as attorney-in-fact for and at the expense of Tenant, as Landlord deems appropriate in its discretion and retain the proceeds therefrom. Tenant shall promptly repair, in a good and workmanlike manner, at its own expense, any damage to the Premises caused by the installation or removal of Tenant's Property.

**21. SURRENDER.**

Upon the expiration or termination of this Lease for any reason Tenant shall immediately and peaceably surrender the Premises to Landlord in a safe and clean condition and in good order and repair, reasonable wear and tear excepted. Should Tenant fail to surrender the Premises upon the expiration or termination of this Lease, Landlord shall have the immediate right to re-enter the Premises and act in accordance with *Article 27* hereof. No act or conduct of Landlord, whether consisting of the acceptance of the keys to the Premises, or otherwise, shall be deemed to be or constitute an acceptance by Landlord of the surrender of the Premises by Tenant prior to the expiration of the term hereof unless Landlord provides Tenant with a written acknowledgment of acceptance of surrender signed by Landlord. The voluntary or other surrender of this Lease by Tenant or a mutual cancellation thereof shall, at the option of Landlord, (i) terminate any or all existing subleases or concessions whether or not previously consented to by Landlord, or (ii) operate as an assignment of any or all such subleases or concessions.

**22. RESERVED.**

**23. TAXES ON TENANT'S PROPERTY.**

Tenant shall pay, prior to delinquency, all personal property taxes assessed against or levied upon Tenant's Property. Tenant shall cause Tenant's Property to be assessed and billed separately from the real property of which the Premises form a part. In the event any or all of Tenant's Property shall be assessed and taxed with said real property, Tenant shall pay to Landlord its share of such taxes, as determined by Landlord, within ten (10) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes applicable to Tenant's Property.

**24. FORCE MAJEURE.**

If Landlord is delayed or prevented from the performance of any act required hereunder by reason of acts of God, strikes, lockouts, labor troubles, civil disorder, inability to procure materials, restrictive governmental laws or regulations or other cause without fault and beyond the reasonable control of Landlord (financial inability excepted), performance of such act shall be excused for the period of delay. Nothing herein shall excuse Tenant from complete performance of all obligations imposed by this Lease (including, without limitation, the timely payment of any rental or other sum required to be paid by Tenant).

**25. RIGHTS RESERVED BY LANDLORD.**

The following rights are hereby reserved by Landlord:

(a) The right to designate and replace a "Managing Agent" to perform all or part of Landlord's obligations under this Lease.

(b) The right to change the name or street address of the Building.

(c) The right to add to or improve any part or all of the Building.

(d) The right to grant to anyone the exclusive right to conduct any business and/or render any service to the Building.

(e) The right to grant to any lessee the exclusive right to use designated parking spaces.

(f) The right to use, lease, license or sell any portion of the Building, or any other property owned or controlled by the Landlord, for any lawful purpose.

(g) The right to reasonably approve the weight, size and location of safes, vaults, computers, machinery, book shelves and other heavy equipment and articles in and about the Premises and the Building, and to require all such items to be moved in and out of the Building or the premises only at such times and in such manner as Landlord shall direct, and in all events at Tenant's sole risk and responsibility.

(h) The right to close or block off temporarily or permanently any exterior doors and windows in the Building.

(i) The right not to enforce a particular rule or regulation against a particular tenant at Landlord's sole discretion. Landlord shall not be responsible to Tenant for the non-performance by any other tenant or occupant of the Building of any of the rules and regulations established by Landlord.

The foregoing rights are exercisable without notice to Tenant or liability for any inconvenience suffered by Tenant as a result thereof (including, without limitation, any diminution of lights, air or view) and Tenant shall not be entitled by reason thereof to terminate this Lease or any abatement or reduction of rental hereunder.

## **26. NOTICES.**

No notice, consent, approval or other communication given in connection herewith shall be validly given, made, delivered or served unless in writing and sent by registered or certified United States mail, postage prepaid, to Landlord (or the Managing Agent if Landlord so designates in the Basic Lease Information) or Tenant, as the case may be, at the addresses set forth in the Basic Lease Information, or to such other addresses as



either party hereto may from time to time designate in writing and deliver in accordance herewith to the other party. Notices, consents, approval or communications shall be deemed given or received twenty-four (24) hours after deposit in the mail as hereinabove provided.

**27. DEFAULTS; REMEDIES.**

**27.1 Defaults.** The occurrence of any one or more of the following events shall constitute a material default and breach of this Lease by Tenant:

- (a) Tenant abandoning or vacating the Premises.
- (b) Tenant's failure to make any payment of Base Rental or any other sum due under this Lease, together with interest thereon as herein provided, as and when due.
- (c) Tenant's failure to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Tenant, other than as described in *Section 27.1(b)* above, where such failure shall continue for a period of twenty (20) days after written notice thereof from Landlord to Tenant.
- (d) To the extent that a declaration of default is not prohibited by law (i) the making by Tenant of any general assignment, or general arrangement for the benefit of creditors; (ii) the filing by or against Tenant of a proceeding under state or federal insolvency and/or bankruptcy laws (unless, in the case of a petition filed against Tenant, the same is dismissed within thirty (30) days; (iii) the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where possession is not restored to Tenant within thirty (30) days; or (iv) the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the premises or of Tenant's interest in this Lease.

**27.2 Remedies.** In the event of any such default or breach by Tenant, Landlord shall be entitled to exercise the following rights and remedies at any time thereafter, with or without notice or demand, and without limiting Landlord in the exercise of any right or remedy which Landlord may have by reason of such default or breach (and Landlord shall be entitled to recover from Tenant all reasonable attorneys' fees and costs incurred by Landlord in enforcing its rights and remedies, regardless of whether legal proceedings are commenced):

- (a) Landlord shall have the right to terminate this Lease effective immediately upon delivery of notice thereof to Tenant. Tenant shall immediately surrender possession of the Premises upon receipt of such notice from Landlord. Notwithstanding such termination, Tenant shall remain liable to Landlord for damages in an amount equal to all rent and other sums that would have become payable by

Tenant under this Lease during the balance of the Lease Term if this Lease had not been terminated, less the net proceeds, if any, of any reletting of the Premises subsequent to such termination, after deducting all of Landlord's expenses incurred in connection with such reletting. Landlord shall have the right to receive such damages from Tenant on the dates that Base Rental and other sums would have become payable under the Lease had the Lease not been terminated. Alternatively, Landlord shall have the right to recover from Tenant (i) the worth at the time of award (defined below) of the unpaid rent which had accrued at the time of termination; (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount off such rent loss that Tenant proves could reasonably have been avoided; (iii) the worth at the time of award of the amount by which the unpaid rent for the balance of the Lease Term, had the Lease not been terminated, after the time of award exceeds the amount of such rent loss that Tenant proves could reasonably be avoided; and (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course of events would be likely to result from such failure. The "worth at the time of award" of the amounts referred to above shall be computed by accruing interest on the unpaid amounts at the rate specified in *Section 27.6*. For the purposes of this Section, unpaid rent shall mean Base Rental and all additional rent that is payable by Tenant hereunder.

(b) Landlord shall have the immediate right of reentry and may remove all persons and property from the Premises, without liability for damages sustained by reason of such removal. Such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Tenant. Should Landlord elect to re-enter as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided by law, it may either terminate this Lease to the same extent and with all the legal incidents as if the term hereof had expired by lapse of time, or it may from time to time, without termination of this Lease, relet the Premises or any part thereof in accordance with *Section 27.3* below. No such reentry or taking possession of the Premises by Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of such intention is given to Tenant or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may, at any time thereafter, elect to terminate this Lease for such previous breach.

(c) Landlord shall have the right, but not the obligation, to render the performance required to cure such default or breach and to charge to Tenant all costs and expenses incurred in connection therewith (including a service fee equal to fifteen percent (15%) of all sums expended by Landlord to cure the default or breach), together with interest thereon from the date incurred by Landlord at the rate provided

below, and Tenant shall immediately pay the same upon presentment of a statement to Tenant indicating the amount thereof.

(d) No remedy herein conferred upon Landlord shall be considered exclusive of any other remedy, but the same shall be cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute, including, but not limited to, the right to maintain an action to recover all amounts due hereunder. Landlord may exercise its rights and remedies at any time, in any order, to any extent, and as often as Landlord deems advisable.

(e) In addition to every other remedy available to Landlord, Landlord may, in the event of default as defined in this Article, obtain the appointment of a receiver in any court of competent jurisdiction, and the receiver may take possession of Tenant's, Property and any other personal property belonging to the Tenant and, used in the conduct of the business of Tenant being carried on in the Premises. Tenant agrees that the entry or possession by said receiver of the Premises and said personal property shall not constitute an eviction of Tenant from the Premises or any portion thereof, and Tenant hereby agrees to hold Landlord safe and harmless from any claim by any person arising out of or in anyway connected with the entry by said receiver in taking possession of the Premises and/or said personal property. Neither the application for the appointment of such receiver, nor the appointment of such receiver, shall be construed as an election on Landlord's part to terminate this Lease unless a written notice of such intention is given to Tenant.

**27.3 Reletting the Premises.** Landlord, in the exercise of its rights under *Section 27.2(a)*, shall have the right to relet the Premises or any portion thereof for such term or terms (which may be for a term extending beyond the term of this Lease) and at such rental and upon such other terms and conditions as Landlord, in its sole discretion, may deem advisable. Landlord shall also have the right to make such alterations and repairs to the Premises as Landlord may deem advisable, in its sole discretion. Upon such reletting, the rents received by Landlord shall be applied first to the payment of any indebtedness other than rent due hereunder from Tenant to Landlord; second, to the payment of any costs and expenses of such reletting and of such alterations and repairs; third, to the payment of rent due and unpaid hereunder; and the residue, if any, shall be held by Landlord and applied to payment of future rent as the same may become due and payable hereunder. If the rents received from such reletting during any month are less than that to be paid during that month by Tenant hereunder, Tenant shall immediately pay any such deficiency to Landlord. Such deficiency shall be calculated and paid monthly.

**27.4 No Waiver.** No delay or omission of Landlord to exercise any right or power arising from any default shall impair any such right or power, or shall be construed to be a waiver of any such default or an acquiescence therein. No waiver of a default shall be effective unless it is in writing. No written waiver by Landlord of any provision of this Lease or any breach by Tenant hereunder shall be deemed to be a waiver of any other provision

hereof, or of any subsequent breach by Tenant of the same or any other provision. Landlord's consent to or approval of any act by Tenant requiring Landlord's consent or approval shall not be deemed to render unnecessary the procurement of Landlord's consent to or approval of any subsequent act of Tenant, whether or not similar to the act so consented to or approved.

**27.5 Late Charges.** Tenant hereby acknowledges that late payment by Tenant to Landlord of rent and other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be difficult to ascertain. Accordingly, if any monthly Base Rental payment or other amount due to Landlord hereunder shall not be received by Landlord within ten (10) days after the due date therefor, Tenant shall pay to Landlord a late charge equal to five percent (5%) of such amount. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of late payment by Tenant, and shall be in addition to any interest which may accrue thereon pursuant to **Section 27.6** below. Any failure by Tenant to pay such late charge within five (5) days after such charge is incurred shall in and of itself constitute a material default and breach of this Lease. Landlord shall have the right to require Tenant to pay all past due obligations, including late charges and interest, in the form of a cashier's check or money order.

**27.6 Interest on Past-Due Obligations.** Any amount due to Landlord which is not paid when due shall bear interest, not to exceed the maximum rate allowed by law, from the date due until paid at a rate equal to two (2) percentage points in excess of the Prime Rate designated by Bank One, Arizona, N.A., from time to time during the period said amounts are owed to Landlord. Payment of such interest shall not excuse or cure any default by Tenant under this Lease.

**27.7 Attorneys' Fees.** In the event either party resorts to judicial proceedings to enforce any right under this Lease or to obtain relief for any default by the other party the party prevailing in such proceedings shall be entitled to recover from the defaulting party the costs thereof, including reasonable attorneys' fees (as determined by the court and not by the jury).

## **28. BANKRUPTCY OF TENANT.**

**28.1 Additional Rights of Landlord.** If any provision of **Article 27** is unenforceable by reason of any state or federal insolvency and/or bankruptcy law, and any trustee in bankruptcy elects to assume or assign Tenant's rights and obligations hereunder, Landlord, may nonetheless terminate this Lease unless such trustee cures all defaults then existing hereunder and provides adequate assurances:

- (a) of the source of rent and other consideration due under this Lease; and

(b) of the source of rent and other consideration due under this Lease; and

**28.2 Proceeds of Assignment to Landlord.** If this Lease is assigned to any person or entity pursuant to the provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq. (the "Bankruptcy Code"), any and all monies or other considerations payable or otherwise to be delivered in connection with such assignment shall be paid or delivered to Landlord, shall be and remain the exclusive property of Landlord and shall not constitute property of Tenant or of the estate of Tenant within the meaning of the Bankruptcy Code. Any and all monies or other considerations constituting property under the preceding sentence not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and be promptly paid to or turned over to Landlord.

**28.3 Right of First Refusal.** If, pursuant to the provisions of the Bankruptcy Code, Tenant assumes this Lease and proposes to assign the same to any person or entity who shall have made a bona fide offer to accept an assignment of this Lease on terms acceptable to Tenant, then notice of such proposed assignment, setting forth (i) the name and address of such person, (ii) all of the terms and conditions of such offer, and (iii) the adequate assurance to be provided Landlord to assure such person's future performance under the Lease, including, without limitations, the assurance referred to in **Section 28.1** above, shall be given to Landlord by Tenant no later than twenty (20) days after receipt by Tenant, but in any event no later than ten (10) days prior to the date that Tenant shall make application to a court of competent jurisdiction for authority and approval to enter into such assignment and assumption. Landlord shall thereupon have the prior right and option, to be exercised by notice to Landlord given at any time prior to the effective date of such proposed assignment, to accept an assignment of this Lease upon the same terms and conditions and for the same consideration, if any, as the bona fide offer made by such person, less any brokerage commissions which may be payable out of the consideration to be paid by such person for the assignment of this Lease.

**28.4 Assignee's Assumption of Liabilities.** Any person or entity to which this Lease is assigned pursuant to the provisions of the Bankruptcy Code shall be deemed without further act or deed to have assumed all of the obligations arising under this Lease on and after the date of such assignment. Any such assignee shall upon demand execute and deliver to Landlord an instrument confirming such assumption.

## **29. LANDLORD LIABILITY.**

**29.1 Default by Landlord.** Landlord shall not be considered in default or breach of this Lease for the nonperformance of any obligation imposed herein unless Tenant provides Landlord with written notice of said nonperformance and:

(a) If said nonperformance relates solely to the nonpayment of money, Landlord fails to perform within thirty (30) days after receipt of said written notice.

(b) If said nonperformance does not relate solely to the nonpayment of money, if Landlord fails to commence performance within thirty (30) days after receipt of Tenant's notice and diligently continue such performance until the obligation for which performance is being rendered is fulfilled.

**29.2 Sale of Landlord's Interest.** In the event of any sale or conveyance of Landlord's interest in this Lease, Landlord shall be entirely relieved of all liability for Landlord's obligations under this Lease accruing thereafter, and the assignee or purchaser shall be deemed without any further agreement between the parties or their successors in interest to have assumed all of the obligations of Landlord under this Lease accruing after such conveyance. This Lease shall not be affected by any such sale or conveyance and Tenant agrees to attorn to such successor-in-interest.

**29.3 No Liability for Loss, Theft, Etc.** Landlord and its agents shall not be liable to Tenant for any damage to property entrusted to employees of Landlord, nor for loss of or damage to any property by theft, disappearance or otherwise, nor for any injury or damage to persons or property resulting from any cause whatsoever, including without limitation fire, explosion, falling plaster, steam, gas, electricity, any act or omission of co-tenants or other occupants of the Building or of adjoining or contiguous property or buildings, water or rain which may leak from any part of the Premises or the Building or from the pipes, tanks, appliances or plumbing works therein, or from the roof, street or subsurface, or from any other place. Landlord and its agents shall not be liable to Tenant for interference with the natural light, nor for any latent defect in the Premises or in the Building. Tenant shall give prompt notice to Landlord of any fire, accident or defect discovered within the Premises or the Building.

**29.4 No Liability of Members or Principals.** Notwithstanding anything contained to the contrary in this Lease, neither Landlord nor Landlord's members, directors, officers, employees, agents or representatives, successors or assigns (collectively, "Landlord's Affiliates") shall be personally responsible or liable for any representation, warranty, covenant, undertaking or agreement of Landlord contained in this Lease, and the sole right and remedy of the Tenant or any subsequent sublessee or assignee shall be against Landlord's interest in the Premises. Neither Tenant nor any subsequent sublessee or assignee shall seek to obtain any judgment imposing personal liability against Landlord, Landlord's Affiliates or their successors or assigns, nor execute upon any judgment or place any lien against any property other than Landlord's interest in the Premises.

**30. GENERAL.**

**30.1 Captions.** The descriptive headings of the Articles and the Sections of this Lease are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

**30.2 Time of the Essence.** Time is of the essence of this Lease.

**30.3 No Partnership; No Third Party Rights.** Nothing contained in this Lease shall create any partnership, joint venture or other arrangement between Landlord and Tenant. Except as expressly provided herein, no term or provision of this Lease is intended to or shall be for the benefit of any person not a party hereto, and no such other person shall have any right or cause of action hereunder.

**30.4 Entire Agreement.** This Lease constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and shall not be changed or added to except in writing signed by all parties hereto. All other prior and contemporaneous agreements, representations, statements and understandings of the parties, oral or written, that modify, amend, or vary or purport to modify, amend or vary any of the terms of this Lease are hereby superseded and merged herein.

**30.5 Joint and Several Obligations.** If Tenant is constituted of two or more persons, corporations or other entities, all agreements, covenants, representations and warranties of Tenant herein are the joint and several obligations of the entities constituting the Tenant. If Tenant is husband and wife, the obligations hereunder shall extend individually to the sole and separate property of each as well as to their community property. Notice given to any one of the entities constituting Tenant shall be deemed as having been given to all such entities.

**30.6 Authority to Execute.** Any individual executing this Lease on behalf of or as representative for a corporation or other person, firm, partnership or entity represents and warrants that he is duly authorized to execute and deliver this Lease on behalf of said corporation, person, firm, partnership or other entity and that this Lease is binding upon said entity in accordance with its terms. If Tenant is a corporation, Tenant shall deliver to Landlord within fifteen (15) days after the execution hereof a certified copy of a resolution of the Board of Directors of said corporation authorizing or ratifying the execution and delivery of this Lease by the individuals executing and delivering same.

**30.7 Arizona Law.** This Lease shall be governed by the laws of Arizona.

**30.8 Partial Invalidity.** If any term, covenant, condition or provision of this Lease is held by a court of competent jurisdiction to be invalid, void or unenforceable, the

remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

**30.9 Incorporation of Exhibits.** All exhibits attached hereto shall be deemed a part of this Lease.

**30.10 Binding on Successors and Assigns.** Each of the provisions of this Lease shall bind, extend to, and inure to the benefit of the respective heirs, legal representatives, and successors and assigns of both Landlord and Tenant; provided, however, that this clause shall not permit any assignment contrary to the provisions of *Article 20*.

**30.11 Impartial Interpretation.** This Lease is the result of negotiations between Landlord and Tenant and therefore the language contained in this Lease shall be construed as a whole according to its fair meaning and not strictly for or against either Landlord or Tenant.

**30.12 Not Binding Until Signed.** Submission of this instrument for examination shall not bind Landlord in any manner, and no lease or obligation on Landlord shall arise until this instrument is executed and delivered by both Landlord and Tenant.



IN WITNESS WHEREOF, the parties hereto have executed this Lease the day and year first hereinabove written.

**"LANDLORD"**

FIFTH COLLEGE, L.L.C., an Arizona limited liability company

By \_\_\_\_\_  
Name Grady Gammage, Jr.  
Title Managing Member

**"TENANT"**

CITY OF TEMPE  
an Arizona municipal corporation

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

\_\_\_\_\_  
Attest

Approved as to form:

\_\_\_\_\_  
City Attorney

**EXHIBIT "A"**

**FLOOR PLAN WITH PREMISES DESIGNATED**

## EXHIBIT A-1

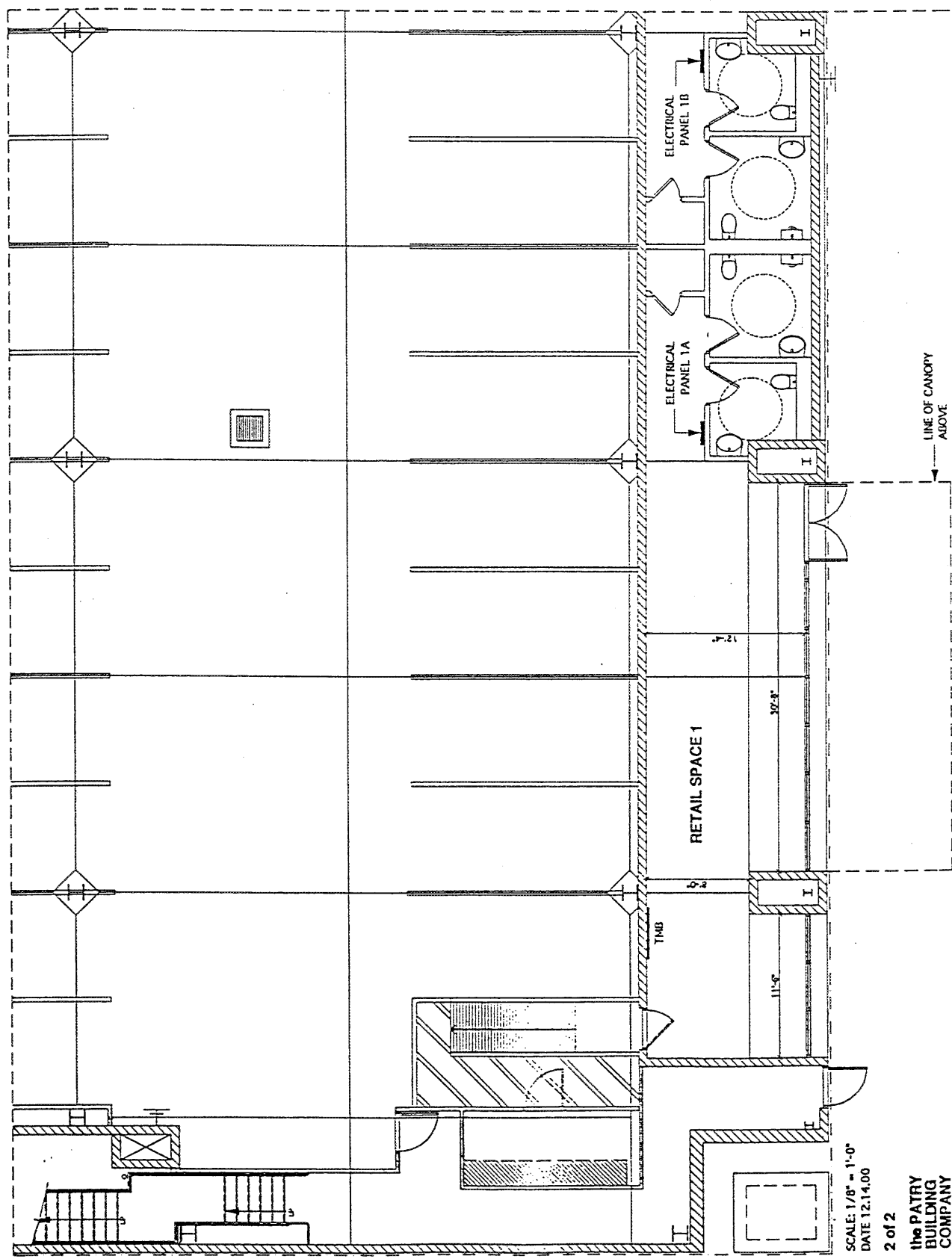
**Project : Transit Station ( Retail 1)**  
502 South College Avenue  
Tempe, Arizona

Revised  
12/14/00  
Page 1 of 2

**The Lessor shall provide the Space and develop it for occupancy as follows:**

1. "Shell" Building: "Shell" Building construction shall be in accordance with the drawings prepared by Tyndall Associates - Revision 1 dated 4/29/00.
2. Location First Level - Retail Space 1
3. Design/ "Lay-out": See Page 2 of 2.
4. Rest Rooms: Provided within subject Space.
5. Tenant Improvements  
In addition, the Lessor shall provide the following Improvements:
  - A. Demising ( Partitions): Demising wall between subject Space and adjacent Tenant Space.
  - B. Interior Finishes:
    - Ceiling: Exposed structure - paint trusses and deck.
    - Floor: Exposed structure - seal concrete floors
    - Walls: Exposed masonry - sandblasted finish.
  - C. Interior Specialties:  
(Cabinets, Counters, etc.) None
  - D. HVAC (Air Conditioning): Provide complete system. Design for 78 degree Fahrenheit at 115 degree Fahrenheit ambient temperature. Exposed ductwork.
  - E. Lighting: Provide complete system - 60 Footcandles average. Simple switching.
  - F. Utilities:
    - Water: No special provisions. Available if required at Tenant cost.
    - Sewer: No special provisions. Available if required at Tenant cost.
    - Gas: No special provisions. Available if required at Tenant cost.
    - Power: Electrical Panel (Panel 1 A) located at Rest Room Corridor.  
Minimal receptacles to comply with code.  
Additional Tenant power requirement shall be provided by Tenant.
  - Telephone / Data: Telephone Mounting Board with 1-1 /4" conduit and "pull string" to T.T.C.  
All cabling by Tenant.
  - G. Special Systems:
    - Fire Sprinkler : Provide complete system to comply with code.
    - Security System By Tenant as required.
- Codes/ Standards: Work shall comply with all applicable codes.

EXHIBIT A-2



SCALE: 1/8" = 1'-0"  
DATE 12.14.00

2 of 2

the PATRY  
BUILDING  
COMPANY